IN THE MICHIGAN SUPREME COURT
Appeal from the Court of Appeals
Murray, C.J., and M.J. Kelly and Rick, JJ.

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN,

Plaintiff-Appellant,

MSC No:
COA No: 352334
Trial Court No: 2019-002106-CZ

v

CALHOUN COUNTY SHERIFF'S OFFICE,

Defendant-Appellee.
_____/

PLAINTIFF-APPELLANT'S

APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Rules

Other Authorities

ORDERS APPEALED FROM AND RELIEF SOUGHT

Plaintiff seeks leave to appeal from the March 25, 2021 decision of the Court of Appeals affirming the trial court's decision that Plaintiff could be denied all access to records that the Calhoun County Sheriff's Office[1] (CCSO) has concerning the detention of Jilmar Ramos-Gomez, a United States citizen who was held in immigration detention by Calhoun County Correctional Facility under a contract CCSO has with U.S. Immigration and Customs Enforcement (ICE). The Court of Appeals determined that the records could be withheld under the exemption to Michigan's Freedom of Information Act (FOIA) for records "specifically described and exempted from disclosure by statute," MCL 15.243(1)(d), because a federal regulation—8 CFR 236.6—should be deemed a "statute" for purposes of MCL 15.243 (1)(d).

8 CFR 236.6 is intended to ensure that ICE has the opportunity to review requests for federal records regarding persons being held in federal custody at local jails by channeling such public record requests through ICE. However, the Court of Appeals interpreted 8 CFR 236.6 as barring release not just of *federal records* related to Mr. Ramos-Gomez's detention, but also of *local* records that ICE does not have and which therefore cannot be obtained from ICE. This interpretation of 8 CFR 236.6 would make most information regarding immigration detainees in Michigan completely secret. The Court of Appeals also erroneously read 8 CFR 236.6 to bar release of records indefinitely, applying the regulation not just to the records of individuals presently in ICE custody in Michigan jails, but also to the records of anyone who was ever in custody, no matter how long ago. Finally, the Court of Appeals reached out to decide an issue that

[1] The Court of Appeals incorrectly stated that the Calhoun County Jail is the named defendant. Ex C, COA Opinion, p 1 n 1. While Calhoun County Jail was originally named as the defendant, an Amended Complaint was filed on September 3, 2019, pursuant to an agreement of the parties, naming the Calhoun County Sheriff's Office as the defendant.

is not even present in this case, holding that 8 CFR 236.6 bars disclosure not just for individuals held in *federal* custody, as was the case here, but also individuals held in *state* custody pursuant to immigration detainers. This issue was not even briefed, because CCSO did not hold Mr. Ramos-Gomez on a detainer, but the Court of Appeals' resolution of that issue would render entirely exempt from disclosure the *state* custody records of immigrants held on detainers.

Under the reasoning of the Court of Appeals, Michigan's FOIA will no longer be available to obtain information about immigrants held for ICE in Michigan jails. As a result, many categories of records will become entirely unavailable, because the federal FOIA cannot be used to obtain records that federal agencies do not have. Here, for example, Mr. Ramos-Gomez alleges that he was detained at Calhoun without treatment for his mental health needs, Am Compl, ¶ 12, but he will not be able to obtain custody, disciplinary, medical and mental health records of his detention at Calhoun, nor the audio and video recordings he sought showing his interactions with jail staff. The same will be true for thousands of immigrants held at dozens of local jails across the state; the records of their detention will become almost entirely secret. The decision has grave implications for public scrutiny of Michigan's jails.

Plaintiff asks this Court to grant leave to appeal so that it can consider whether Michigan's FOIA exemption for records exempted by "statute" should be read expansively to mean "statutes and regulations," and whether 8 CFR 236.6 bars all access under Michigan FOIA to records related to the detention of immigrants held in local jails under contracts with ICE. The Court should also vacate the portions of the decision below that decides 8 CFR 236.6's application to immigration detainers—an issue that was not presented by the facts or briefed by either party.

QUESTIONS PRESENTED

I. Where Michigan's Freedom of Information Act (FOIA) is a pro-disclosure statute whose exemptions must be narrowly construed, where MCL 15.243 (1)(d) permits withholding of public records only when "specifically described and exempted from disclosure by statute," and where there is no statute that authorizes withholding of the requested records, can access to public records be denied based solely on a federal regulation, 8 CFR 236.6?

The Trial Court said:	Yes.
The Court of Appeals said:	Yes.
Plaintiff-Appellant says:	No.

II. Should 8 CFR 236.6 be read to eliminate all access to records under FOIA for people detained in Michigan on alleged immigration violations where:

A. The text of 8 CFR 236.6 is limited to federal records; where an interpretation of 8 CFR 236.6 to cover local records would be ultra vires because any underlying statutory authority for 8 CFR 236.6 at most delegates authority to control federal records in the possession of local entities; where the purpose of 8 CFR 236.6 is to channel review of federal records through ICE; and where the practical result of such an interpretation would be that most local records could never be obtained;

B. The present-tense language of 8 CFR 236.6 makes clear that it does not apply to records of individuals who are no longer in federal custody; and

C. The Court of Appeals expanded the bar on record access to individuals held in state criminal custody on detainers, even though this case involves records of an individual held in federal immigration custody pursuant to a contract between ICE and CCSO?

The Trial Court said:	Yes.
The Court of Appeals said:	Yes.
Plaintiff-Appellant says:	No.

JURISDICTION

This Court has jurisdiction pursuant to Const 1963, art 6, § 4, MCL 600.212, MCL 600.215(3), and MCR 7.303(B)(1) to review a case after a decision by the Court of Appeals.

On March 25, 2021, the Court of Appeals affirmed the December 30, 2019 judgment of the trial court granting summary disposition against Plaintiff-Appellant. On April 15, 2021, Plaintiff-Appellant filed a motion for reconsideration, which the Court of Appeals denied on May 25, 2021. This application is being timely filed within 42 days of the Court of Appeals' denial of the motion for reconsideration. MCR 7.305(C)(2)(c).

GROUNDS FOR GRANTING THE APPLICATION

This application presents issues of significant public interest and involves legal principles of major significance to Michigan jurisprudence, MCR 7.305(B)(2)-(3), namely: (1) whether the FOIA exemption in MCL 15.243 (1)(d) should be narrowly or expansively construed; and (2) whether a federal regulation, 8 CFR 236.6, should be read as entirely eliminating any right of public access under Michigan's FOIA to records related to the detention of immigrants by state and local officials—records that ICE typically does not have. The premise of FOIA is that transparency is central to accountability, and to a free and democratic society. MCL 15.231(2) ("The people shall be informed so that they may fully participate in the democratic process."). Yet under the Court of Appeals' interpretation of MCL 15.243 (1)(d), the public could be denied access to records even though there is no statutory basis for withholding, an issue with implications for record access in virtually every area of government. And under the Court of Appeals' interpretation of 8 CFR 236.6, immigration detention in Michigan would be insulated from public scrutiny, and large categories of public records would be rendered entirely secret.

First, with regards to MCL 15.243 (1)(d), which permits withholding of public records "specifically described and exempted from disclosure by statute," this Court has never decided whether the term "statute" means "statute" or whether it means "statute or regulation." The Court of Appeals has issued conflicting decisions on the question, concluding on the one hand that the language of MCL 15.243 (1)(d) "plainly includes only statutes," *Detroit Free Press v City of Warren*, 250 Mich App 164, 170-172; 645 NW2d 71 (2002), and on the other that the exemption applies "if disclosure is prohibited by federal regulations," *Michigan Council of Trout Unlimited v Dep't of Military Affairs*, 213 Mich App 203, 218; 539 NW2d 745 (1995). See MCR 7.305(B)(5)(b) (listing a conflict with another decision of Court of Appeals as a basis for Supreme Court review). The question whether an administrative regulation can be used to deny the public access to government records, in the absence of any statute authorizing the withholding of such records, has implications for access to records for all or virtually all government entities in this state. Leave should be granted so that this Court can resolve whether the term "statute" in MCL 15.243 (1)(d) should be read to include regulations, even though FOIA is a pro-disclosure statute whose exemptions must be narrowly construed. *Bradley v Saranac Cmty Sch Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997).

Second, the Court of Appeals' unprecedented interpretation of 8 CFR 236 would eliminate entirely any right of public access under Michigan's FOIA to records of immigration detention by Michigan sheriffs and other state and local officials. The thousands of people held in federal immigration detention by ICE in Michigan each year are held in one of four county jails that have bed-space contracts with ICE.[2] In addition, each year ICE sends thousands of detainers—which

[2] U.S. Immigration and Customs Enforcement, Detention Management, FY 2019 Detention Statistics, available at https://www.ice.gov/detain/detention-management (link to filterable excel spreadsheet for 2019 data available under "Previous Year-End Reports").

are requests to extend state custody so that ICE may apprehend a person—to prisons and jails throughout the state.[3] Without FOIA, it will be difficult if not impossible to get information on what is happening to people detained on alleged immigration violations in Michigan. Yet the need for government transparency is at its highest when government acts behind jail or prison gates. See, e.g., *Prison Legal News v Samuels*, 415 US App DC 354, 363; 787 F3d 1142 (2015) (recognizing public's interest in disclosure of documents that provide insight into how prisons are managed and operated, and how tax dollars are expended); *American Civil Liberties Union v US Dep't of Homeland Security*, 973 F Supp 2d 306, 316 (SDNY, 2013) ("The public interest in disclosure is particularly compelling here because the ACLU seeks to highlight ICE's historically troublesome practices of 'prolonged immigration detention—for months, if not years—without adequate procedures in place to determine whether their detention is justified.'").

The trial court held that Michigan jails cannot release **any** information about immigrants detained there for the federal government. It applied that prohibition indefinitely, regardless of how long ago the person was released. And the Court of Appeals, inexplicably, extended that prohibition to cover people who are not even detained by ICE, but are in state or local custody. The issue is thus one of exceptional importance: under the reasoning of the Court of Appeals, Michigan's FOIA is effectively useless for shining light on what happens to the thousands of immigrants detained in Michigan prisons and jails each year. Even more alarming, because most records involving immigration detention in Michigan are county jail records that ICE does not have, these records *cannot be obtained through the federal FOIA*. Thus, under the Court of Appeals' interpretation of MCL 15.243 (1)(d) and 8 CFR 236, vast categories of records—medical

[3] See Syracuse University, Latest Data: ICE Detainers, https://trac.syr.edu/phptools/immigration/detain/ (listing detainers issued per fiscal year).

records, disciplinary records, logs of interactions with jail staff, the list goes on—will become completely secret for thousands of people each year, unobtainable through federal *or* state FOIAs. To Plaintiff's knowledge, no court has ever before held that 8 CFR 236.6 covers local records that ICE does not have, such that those records become entirely unavailable. This Court should review whether immigration detention in Michigan—carried out by state and local officials—can suddenly become completely immune from public scrutiny.

The fact that the Court of Appeals' opinion is unpublished is small comfort. As a practical matter the decision is likely to govern the release of detention information about immigrants held not just at Calhoun (where most immigrants detained by ICE in Michigan are held),[4] but throughout the state. Municipal attorneys, who of course share information amongst themselves, are likely to rely on this decision, as will trial courts, who often look to unpublished Court of Appeals cases as persuasive authority. Thus, if review is not granted here, virtually all public records related to the detention of immigrants in Michigan are likely to become unavailable under FOIA, unless or until another litigant has the resources to bring a case up through the appellate process. This Court should grant leave and review the lower court's determination that 8 CFR 236.6 renders large categories of records entirely secret and makes Michigan's FOIA useless for obtaining information about immigration detention by state and local officials.

In sum, this Court should grant leave because this case presents issues of significant public interest and involves legal principles of major significance to Michigan jurisprudence, because the Court of Appeals has issued conflicting decisions on the scope of MCL 15.243 (1)(d), and because the Court of Appeals' erroneous interpretation of 8 CFR 236.6 will cause material injustice,

[4] See Freedom for Immigrants, Mapping U.S. Immigration Detention, https://www.freedomforimmigrants.org/map (listing average daily facility populations).

effectively eliminating the public's ability to obtain immigration detention records, not just for Mr. Ramos-Gomez, but for thousands of other people who have been detained in Michigan jails for alleged immigration violations. MCR 7.305(B)(2)-(3), (5).

FACTS AND PROCEDURAL HISTORY

Detention of Immigrants and Immigration Detention Records in Michigan

Because this case concerns whether all records of immigration detention in Michigan are exempt from disclosure under Michigan's FOIA, at the outset it is important to understand how immigration detention works in Michigan, and what types of records are created. All immigrants detained in Michigan by ICE are held in one of four county jails (Calhoun, St. Clair, Chippewa and Monroe) that have bed-space contracts called Intergovernmental Service Agreements ("IGSAs") with ICE.[5] Calhoun is the jail with the largest number of ICE detainees, and had an average daily ICE population of 184 in 2019.[6] The other three Michigan IGSA facilities had a combined average daily population of 167.[7] Around the country, the average daily population of people held by ICE in IGSA facilities was approximately 14,290 (out of a total average daily ICE detainee population of 50,165).[8]

---

[5] FY 2019 Detention Statistics, *supra*. ICE also has contracts with Kent County and the City of Dearborn to hold people in their facilities for less than 72 hours. See National Immigrant Justice Center, Exposing ICE Detention Contracts and Inspections Transparency Project, https://immigrantjustice.org/transparency/detention# Facility_docs.

[6] FY 2019 Detention Statistics, *supra.* Fiscal year 2019 detention statistics are a more accurate reflection of past practice compared to 2020 numbers, given the impact of the COVID-19 pandemic on lowering detention numbers in Michigan and the rest of the country, through both discretionary and court-ordered releases.

[7] *Id.*

[8] U.S. Immigration and Customs Enforcement, *Fiscal Year 2019 Enforcement and Removal Operations Report*, available at https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf.

People detained under an IGSA are in federal custody. However, in Michigan, all such individuals are housed alongside criminal justice system detainees in county jails. At Calhoun, "ICE detainees are indistinguishable from the criminal detainees." Morris Diaz Aff, ¶ 6, Pl's Court of Appeals Appendix [hereinafter COA Appendix] 97a. "They are housed alongside criminal detainees, they are given the same uniform, they are given the same meals, and are supervised by the same officers and staff personnel." *Id*.

IGSAs are distinct from detainers, which are requests by ICE for a state or local facility to continue a person's detention for a period of time until ICE can take the person into custody.[9] Persons held on detainers are in state or local custody, not ICE custody. ICE issues detainers to whatever law enforcement agency it believes is holding an individual whom ICE wishes to arrest. In other words, any jail in Michigan can receive an ICE detainer. ICE issued approximately 1,100 detainers in Michigan in 2019 requesting that state and local facilities extend a person's criminal custody until ICE can make an arrest, and issued more than 165,000 detainers nationally.[10]

The FOIA request at issue here involves only an IGSA, not a detainer. Calhoun's contract with ICE provides that the jail will provide detention services and spells out each party's obligations. See Calhoun IGSA, COA Appendix 31a-42a. CCSO's FOIA Officer averred that the only records CCSO has for Mr. Ramos-Gomez are those related to his December 2018 detention

[9] As the relevant federal regulations explain:

> A detainer serves to advise another law enforcement agency that the Service [ICE] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Service, prior to release of the alien, in order for the Service to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible. [8 CFR 287.7.]

[10] *Fiscal Year 2019 Enforcement and Removal Operations Report*, *supra*, p 17.

"pursuant to the Calhoun County Sheriff's Department Intergovernmental Service Agreement (IGSA) with the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE)." Dyer Aff, ¶ 4.b, COA Appendix 45a.

When a person is detained under an IGSA, there will generally be two types of records created. First, the federal government will create records, such as ICE apprehension documents or documents related to the person's immigration proceedings. Theoretically such documents can be obtained through the federal Freedom of Information Act, 5 USC 552 *et seq*., subject to any redactions or withholding authorized under federal law, although as a practical matter backlogs in ICE FOIA processing mean that it is often impossible to obtain ICE records in a timely manner or without litigation. See *Nightingale v US Citizenship and Immigration Servs*, __ F Supp 3d __, __; 2020 WL 7640547, at *7 (ND Cal, 2020) (finding that ICE has a pattern of unreasonable delay in responding to FOIA requests).

Second, an IGSA detention will generate local jail records.[11] The contracting local facility will create records such as housing and booking records, medical and disciplinary records, property inventories, and video/audio recordings of the detained person or interactions with jail staff. Such jail records are created and maintained locally, and are not in ICE record keeping systems or databases. Pasquarella Aff, ¶ 25, COA Appendix 83a. In short, jails with bed-space contracts for ICE create the same sorts of records for detained immigrants as they create for people detained in the criminal justice system. For criminal justice system detainees, such documents are routinely released under Michigan's FOIA (subject to any applicable redactions) where, for example, individuals seek to document allegations of abuse, need jail medical records, or are trying to

[11] Similarly, when a person's state or local custody is extended as the result of the detainer request, there will be state or local records both for the period of the initial criminal incarceration, and for any period where state or local custody is extended awaiting an ICE arrest.

understand conditions of confinement at a facility. Here, however, the Court of Appeals held that the exact same types of documents routinely provided under Michigan's FOIA for criminal justice system detainees cannot be provided for immigration detainees. Moreover, because ICE does not have these records, these records cannot be obtained through the federal FOIA, except to the extent that a local jail happens to have sent the documents to ICE. See Argument II.A.

U.S. Citizen Jilmar Ramos-Gomez Seeks Federal and Local Records To Understand His Detention by ICE at Calhoun County Correctional Facility

The specific FOIA request that led to the Court of Appeals' decision closing off all access to immigration detention records under the Michigan FOIA arose out of ICE's wrongful detention of U.S. citizen Jilmar Ramos-Gomez. Mr. Ramos-Gomez, who was born and raised in Grand Rapids, is a veteran of the United States Marine Corps who served his country in Afghanistan and, because of his combat experience, now suffers from Post-Traumatic Stress Disorder. After a mental health episode in December 2018 during which Mr. Ramos-Gomez trespassed on the helipad of a hospital in Grand Rapids, he was lodged in the Kent County Jail. A Grand Rapids Police Department captain, acting based on Mr. Ramos-Gomez's name and Latino appearance, asked ICE to check his status. ICE then placed an immigration detainer on Mr. Ramos-Gomez even though he is a United States citizen and was carrying both a United States passport and a Michigan REAL ID card when he was arrested. At the end of his Kent County detention, Calhoun County Sheriff's Office officers took Mr. Ramos-Gomez into custody for ICE, transported him to the Calhoun County Correctional Facility, and held him there (pursuant to Calhoun's IGSA contract with ICE) for three days without treatment for his mental health needs. That wrongful arrest garnered extensive national media attention. See Am Compl, ¶¶ 11-12; Silva, *ACLU Says Records Show Racial Profiling, Mocking of Marine Detained by ICE*, NBC News (January 17,

2019);[12] Rosenberg, *A Latino Marine Veteran Was Detained for Deportation. Then ICE Realized He Was a Citizen*, Washington Post (January 16, 2019).[13]

To find out how it was possible that Mr. Ramos-Gomez could be wrongfully detained at Calhoun by ICE despite being a United States citizen, the ACLU, on behalf of Mr. Ramos-Gomez,[14] sent public records requests to both Calhoun and ICE.[15] The FOIA request to Calhoun, initially submitted on January 17, 2019, and amended on January 23, 2019, sought all records related to Mr. Ramos-Gomez's detention at Calhoun, specifically including:

- Booking records, intake records, personal property records, custody and disciplinary records, release or court orders, warrants, and medical and mental health records;
- Audio recordings and video recordings showing Mr. Ramos-Gomez (e.g. interactions with intake staff);
- Records of communications between ICE and CCSO concerning Mr. Ramos-Gomez;
- Records of communications between Calhoun and the Kent County Sheriff's Department regarding Mr. Ramos-Gomez; and
- ICE apprehension documents such as ICE forms I-247, I-200, I-203 or I-203A and I-205. [FOIA Requests, COA Appendix 13a-17a.]

[12] Available at https://www.nbcnews.com/news/latino/aclu-says-records-show-racial-profiling-mocking-marine-detained-ice-n975756.

[13] Available at https://www.washingtonpost.com/national-security/2019/01/17/latino-marine-veteran-was-detained-deportation-then-ice-realized-he-was-citizen/.

[14] The request included an authorization for release of records signed by Mr. Ramos-Gomez. January 17, 2019 FOIA Request Attachment, COA Appendix 15a.

[15] The ACLU also sent a FOIA request to the Kent County Sheriff's Department, and received responsive documents.

Calhoun's Refusal to Provide Responsive Records

On January 28, 2019, Calhoun denied the request, citing MCL 15.243 (1)(d), which permits a public body to withhold "[r]ecords or information specifically described and exempted from disclosure by statute." See Response to FOIA Request, COA Appendix 18a. Calhoun's response did not mention 8 CFR 236.6—the regulation on which it now relies to deny records and which it invoked only after litigation commenced.[16] This failure to mention 8 CFR 236.6 in the FOIA denial is unsurprising because "[a]fter all, this relatively obscure regulation was promulgated to protect information about individuals detained by the federal government on suspicion of terrorism following the attacks of September 11, 2011."[17] See *Voces De La Frontera, Inc v Clarke*, 373 Wis 2d 348, 383; 891 NW2d 803 (2017) (Bradley, J., dissenting) (noting that the defendant did not raise 8 CFR 236.6 as a justification for denying records until the case was on appeal). Calhoun's refusal to produce documents related to Mr. Ramos-Gomez is a departure from its prior practice of releasing documents in response to FOIA requests that relate to ICE detention in the Calhoun County Correctional Facility. See Morris Diaz Aff, ¶ 8, COA Appendix 97a-98a.

ICE's Failure to Respond to the Federal FOIA Request and the Federal Litigation

Mr. Ramos-Gomez sought records about his unlawful detention not just from Calhoun, but also from ICE, submitting a federal FOIA request to that agency on March 9, 2019. See *American*

[16] Calhoun's denial initially pointed to a federal notice involving an ICE record-keeping system. Response to FOIA Request, COA Appendix 18a. The records that Mr. Ramos-Gomez seeks are stored in Calhoun's local record keeping system, not in the ICE record-keeping system covered by that federal notice. Pasquarella Aff, ¶ 18, COA Appendix 79a. Unsurprisingly, neither the trial court nor the Court of Appeals relied on that notice in upholding the denial of records, and Defendants appear to have since abandoned that argument.

[17] 8 CFR 236.6 has rarely been invoked either by the federal government or by local entities, and there are only a handful of decisions interpreting the regulation nationwide.

Civil Liberties Union of Michigan v US Dep't of Homeland Security, United States District Court for the District of Columbia (Docket No. 19-cv-3489), FOIA Request, Dkt 1-1 (November 20, 2019). The FOIA submitted to ICE sought all records in ICE's custody or control that relate to Jilmar Ramos-Gomez, including custody, disciplinary, medical and mental health records, as well as audio and video recordings. *Id.*, pp 4-5. The request specified that ICE should produce records "whether or not in ICE's possession, in which ICE claims an interest or which ICE asserts may not be disclosed by other entities based on laws or regulations regarding the disclosure of ICE records." *Id*., p 4. In other words, Plaintiff specifically sought to obtain local records that were not directly in ICE's possession.

Eight months later, ICE had not produced a single document in response to the federal FOIA request, and on November 20, 2019, the ACLU filed suit in federal court. See *id*., Complaint, Dkt 1. As is typical in federal FOIA litigation, the parties then negotiated a production schedule. See *id*., Joint Status Report, Dkt 14 (January 21, 2020). ICE reported that productions were complete as of September 28, 2020. *Id.*, Joint Status Report, Dkt 18, ¶¶ 3-4 (October 5, 2020).

The vast majority of records Mr. Ramos-Gomez requested from CCSO were not produced by ICE in the federal FOIA case. ICE did not have, and therefore did not produce, records such as Calhoun's custody, disciplinary, medical and mental health records, or audio recordings, video recordings and other documents showing interactions between Mr. Ramos-Gomez and jail staff.[18]

[18] At the time the instant case was filed, the federal litigation had not yet commenced, so there is nothing in the trial court record regarding the results of that litigation. ICE did not represent that it had completed its productions in the federal case until September 28, 2020, after Plaintiff had filed its brief in the Court of Appeals. Plaintiff informed the Court of Appeals about the results of the federal litigation in its reply brief and at oral argument. See Pl's Court of Appeals Reply Br, p 2 n 2; Court of Appeals Oral Argument, March 3, 2021, 4:37-5:06, https://www.youtube.com/watch?v=Wfqig3c0p9w&t=307s. If leave is granted, Plaintiff-Appellant is prepared to file a

Procedural History and Opinions Below

On July 26, 2019, the ACLU filed the instant suit under Michigan's FOIA to compel CCSO to release the records pertaining to Mr. Ramos-Gomez's detention that CCSO had withheld. Compl, p 2. After some initial proceedings, the parties filed cross motions for summary disposition. A hearing was held on December 16, 2019, and the trial court announced from the bench that it would grant Defendant's motion for summary disposition. Ex A, Trial Court Transcript. The trial court held that the requested records were covered by 8 CFR 236.6, and are therefore exempt under MCL 15.243 (1)(d), stating:

> [T]he Michigan Statute combined with the federal regulation dictates my ruling in this particular case and covers the records that are in place here. The jail has a contract with ICE through the federal government for housing detainees and based upon that when you look at the Michigan Freedom of Information Act it directs you towards, is there another statute that should prevent these records from being disclosed and the definition of statute is adequately defined by the defendant in that this and that is the federal regulation that was sited [sic]. [Ex A, Trial Court Transcript, pp 22-23.]

The court acknowledged that there would be responsive records, but held that "[y]our remedy is through the federal government and through ICE specifically . . ." *Id.*, p 23. The court did not discuss whether a regulation qualifies as a statute for the purposes of MCL 15.243 (1)(d). The trial court entered its order granting summary disposition on December 30, 2019. Ex B, Trial Court Order. Plaintiff timely appealed.

On March 25, 2021, the Court of Appeals affirmed the trial court's grant of summary disposition. Ex C, COA Opinion. The court held that a regulation qualifies as a "statute" within the meaning of 8 CFR 236.6. *Id*., p 5. The court then read 8 CFR 236.6 as exempting the records,

---

motion to supplement the record with an affidavit setting out what documents have and have not been obtained through the federal litigation.

finding that "plaintiff was required to seek the requested records through a federal FOIA request." *Id*.

On April 15, 2021, Plaintiff filed a motion for reconsideration, highlighting two errors in the Court of Appeals' opinion. First, Plaintiff pointed out that the Court of Appeals' reasoning throughout the opinion was predicated on the assumption that Plaintiff's remedy is through the federal FOIA, but that in fact the requested records cannot be obtained through the federal FOIA. See Pl's Mot for Reconsideration, pp 3-4. Thus, under the court's reasoning, entire categories of records are completely unobtainable. *Id.* Second, Plaintiff noted that the opinion inaccurately stated that Mr. Ramos-Gomez was held at Calhoun on a detainer (when he was in fact held under an IGSA), and further held that 8 CFR 236.6 bars local entities from disclosing records of people held in state custody under a detainer. *Id.*, pp 7-8. Plaintiff explained that the question whether 8 CFR 236.6 bars local facilities from releasing detainer information, which concerns individuals in local or state custody as opposed to ICE custody, was not at issue in this litigation and was never briefed. *Id.* The Court of Appeals denied the motion for reconsideration without comment on May 25, 2021.

STANDARD OF REVIEW

The proper interpretation and application of FOIA is a question of law that is reviewed de novo. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006). A trial court's decision on a motion for summary disposition is reviewed de novo. *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016). "A court reviewing a motion under MCR 2.116(C)(10) must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and

grant the benefit of any reasonable doubt to the opposing party." *White v Taylor Distrib Co*, 482 Mich 136, 139; 753 NW2d 591 (2008) (internal quotation marks omitted).

ARGUMENT

I. THE COURT SHOULD GRANT LEAVE TO RESOLVE A CONFLICT IN COURT OF APPEALS DECISIONS ABOUT WHETHER A FOIA EXEMPTION FOR RECORDS SPECIFICALLY DESCRIBED BY STATUTE CAN BE EXPANDED TO ENCOMPASS RECORDS DESCRIBED ONLY BY A REGULATION.

Under the Michigan FOIA, any public record that is requested "must be disclosed unless there is explicit authorization for withholding." *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 544 n 6; 475 NW 2d 304 (1991) (citation and quotation marks omitted). A public body that refuses to disclose a requested document bears the burden of proving that the withheld material was specifically exempt under Section 13 of the Act, MCL 15.243. *Id.* at 544. That section "sets forth a series of exemptions granting the public body the discretion to withhold a public record from disclosure if it falls within one of the exemptions." *Michigan Federation of Teachers v Univ of Michigan*, 481 Mich 657, 665; 753 NW2d 28 (2008).

To deny the requested records in this case, Defendant relied solely on the FOIA exemption in MCL 15.243 (1)(d) which permits withholding of "[r]ecords or information specifically described and exempted from disclosure by statute." For MCL 15.243 (1)(d) to apply, CCSO must thus establish that there is a "statute" that "specifically describes and exempts from disclosure" the records being withheld. There is no statute that permits withholding of the requested records. The exemption can apply only if the word "statute" in MCL 15.243 (1)(d) is expanded to mean not just a statute, but also a regulation.

This Court has never decided whether the term "statute" in MCL 15.243 (1)(d) should be expansively construed to mean "statute and regulation." And the Court of Appeals has issued conflicting rulings on the question. In its most recent decision, *Detroit Free Press v City of Warren*,

250 Mich App 164, 170-172; 645 NW2d 71 (2002), the Court of Appeals concluded that the language of MCL 15.243 (1)(d) "plainly includes only statutes," rejecting an argument that the exemption should be read to allow withholding of documents allegedly exempt under a court rule. The Court of Appeals there noted that "[t]he Legislature is presumed to have intended the meaning it plainly expressed," *id.* at 173, citing *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997), where this Court explained that "[i]f the language used [in a statute] is clear, then the Legislature must have intended the meaning it has plainly expressed, and the statute must be enforced as written." The *Detroit Free Press* court contrasted the FOIA exemption under MCL 15.243 (1)(d), which uses only the term "statute," with the FOIA exemption under MCL 15.243(1)(h), where the Legislature "specifically exempt[ed] information subject to privileges recognized 'by statute *or court rule*.'" *Detroit Free Press*, 250 Mich App at 171, citing MCL 15.243 (1)(h) (original emphasis). The fact that the Legislature used the term "statute" for the exemption in MCL 15.243(1)(d) and "statute or court rule" for the exemption in MCL 15.243(1)(h), reinforces that point that the Legislature is perfectly capable of saying what it means. See *Old Elec, Inc v RCP, Inc*, 142 BR 189, 191 (Bankr ND Ohio, 1992) (explaining that "[i]n careful legal usage one would expect 'statute' to be reserved for legislative acts" and that legislative drafters "distinguished statutes from rules, and that they used 'law' not 'statute' as a generic referent"); *McWilliams v City of Long Beach*, 56 Cal 4th 613, 621-622; 300 P3d 886 (2013) (distinguishing legislature's use of word "statute" from words like "regulation," "ordinance" or "charter").

In MCL 15.243(1)(d) the Legislature used the term "statute," not "statute and regulation." By contrast, in countless other statutes the Legislature refers to **both statutes and regulations** when it intends for a legislative act to cover to both. See, e.g., MCL 400.105b ("the department of

community health shall not implement incentives under this section that conflict with federal statute or regulation"); MCL 409.118 (providing that employment of a minor "shall not be in violation of a federal statute or regulation"); MCL 400.589 (providing area agency on aging may take actions "in compliance with the policies, guidelines, or rules as set forth by federal or state statute and regulation"); MCL 409.101 (providing for the Michigan Workforce Investment Board that "all members of the board shall be individuals with optimum policymaking authority within the organizations, agencies or entities that they represent by federal statute and regulation"); MCL 600.2974 (addressing liability where "a material violation of an adulteration or misbranding requirement prescribed by a statute or regulation of this state or the United States that proximately caused the injury or death"); MCL 21.272 (tax reporting statute addressing estimated costs "not taxed by this state due to federal statute or regulation"); MCL 440.9311(1)(a)(1) (describing exemption from necessity of filing a financing statement where a "statute, regulation, or treaty of the United States" is at issue); MCL 324.503 (requirement to provide copies of orders to legislative committee "does not apply to an order that does not alter the substance of a lawful provision that exists in the form of a statute, rule, regulation, or order at the time the order is prepared"); MCL 333.5477 (providing that application of sanctions does not preclude other sanctions "contained in the provisions of any other federal, state, or political statute, rule, regulation, or ordinance").

Moreover, as *Detroit Free Press* recognizes, "FOIA is a prodisclosure statute with narrowly construed exemptions." 250 Mich App at 171, citing *Mager v Dep't of State Police*, 460 Mich 134, 143, 146-147; 595 NW2d 143 (1999). As the *Detroit Free Press* court understood, reading "statute" to mean "statute and regulation" would construe MCL 15.243(1)(d) broadly, not narrowly as required under Michigan FOIA law. Accord *Lawrence v City of Troy*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2009 (Docket No. 289509); 2009 WL

1782691, at *4 (holding that discovery preclusion rules promulgated by the Supreme Court are not "statutes" for the purposes of MCL 15.243 (1)(d)) (Ex D).

An older decision of the Court of Appeals, *Michigan Council of Trout Unlimited v Dep't of Military Affairs*, 213 Mich App 203, 218; 539 NW2d 745 (1995), conflicts with *Detroit Free Press*. In *Trout Unlimited*, the Court of Appeals, without any discussion of the language of MCL 15.243(1)(d), held that "documents are exempt from disclosure if disclosure is prohibited by federal regulations."[19] In the instant case, the Court of Appeals chose to follow *Trout Unlimited* rather than *Detroit Free Press*. Ex C, COA Opinion, p 5.

Leave should be granted so that this Court can resolve whether the term "statute" in MCL 15.243(1)(d) should be read to include regulations. Such a reading contradicts this Court's holding that "FOIA requires the full disclosure of public records, unless those records are exempted under § 13" and that "[t]he exemptions in § 13 are narrowly construed." *Bradley*, 455 Mich at 293; see also *Swickard*, 438 Mich at 544 (same). The requirement that exemptions be narrowly construed reflects the legislative purpose of FOIA: "It is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government." MCL 15.231(2). While agencies may be able to flesh out the meaning of a statutory exemption, they cannot create brand new exemptions not found in statute. That is the clear import of the Legislature's decision to recognize exemptions created by "statute" but not those created purely by "regulation." In other words, where, as here, there is no underlying statute that permits withholding, a regulation standing

[19] In *Trout Unlimited* the court cited to *Soave v Dep't of Ed*, 139 Mich App 99, 102; 360 NW2d 194 (1984), where the Court of Appeals opined that "[s]ince agency regulations promulgated by the federal government have the force of federal statutory law," regulations should be considered statutes for the purposes of the FOIA exemption. *Soave* was decided in 1984, and is not precedential authority. MCR 7.215(J)(1).

alone cannot be used under MCL 15.243(1)(d) to justify denying the public access to public records.[20]

II. THE COURT SHOULD GRANT LEAVE TO DETERMINE WHETHER 8 CFR 236.6 CAN PROPERLY BE INTERPRETED AS ELIMINATING ALL ACCESS UNDER MICHIGAN'S FOIA TO RECORDS FOR PERSONS DETAINED IN MICHIGAN ON ALLEGED IMMIGRATION VIOLATIONS.

Defendant may argue that even if the requested records are not exempt from disclosure under Michigan's FOIA, 8 CFR 236.6 still bars disclosure because there is then a conflict between state and federal law. See *Cipollone v Liggett Group, Inc*, 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992) (absent an express statement in federal legislation that state laws are preempted, state law is preempted "if that law actually conflicts with federal law"). But there is no conflict here: If 8 CFR 236.6 is properly interpreted, the federal regulation does not bar release of the requested records.

We turn, therefore, to the proper interpretation of the regulation. While the proper interpretation of 8 CFR 236.6 might at first blush appear to be a question better suited to resolution by a federal court, it is state courts that have had to grapple with the regulation's meaning. This is because the regulation comes into play principally in state-court public records litigation when state or local governmental defendants rely on it to justify withholding requested records that could be argued to fall within its ambit. See, e.g., *American Civil Liberties Union of New Jersey, Inc v Co of Hudson*, 352 NJ Super 44; 799 A2d 629 (2002) (state public records request case interpreting 8 CFR 236.6); *Comm'r of Correction v Freedom of Info Comm*, 307 Conn 53; 52 A3d 636 (2002)

[20] Notably in *Trout Unlimited*, 213 Mich App at 218, the Court of Appeals held that "[e]ven in the absence of federal regulations, disclosure was properly denied pursuant to § 13(1)(d) because the documents fall within [the federal FOIA exemption in 5 USC 552(b)(5)]." The court does not cite the federal regulations which it found also prohibited disclosure, and it is thus unclear whether those regulations were simply fleshing out what documents are covered under 5 USC 552(b)(5) (or under some other statute barring disclosure), or whether those regulations were untethered to any underlying statute, as is the case here.

(same); *Voces De La Frontera*, 373 Wis 2d 348 (same). Moreover, state courts routinely decide preemption issues, and interpretation of 8 CFR 236.6 is necessary to determine whether there is such an issue here.[21] See *United States v California*, 314 F Supp 3d 1077, 1092 (ED Cal, 2018) (interpreting 8 CFR 236.6 as not conflicting with a California statute requiring governmental oversight of immigration detention facilities).

8 CFR 236.6 is part of the Department of Homeland Security's (DHS's) immigration regulations, 8 CFR Subpart A – Detention of Aliens Prior to Order of Removal, and provides:

> 8 CFR 236.6: Information regarding detainees
>
> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section

[21] 8 CFR 236.6 could preempt state law only if it is based on a valid delegation of congressional authority:

> The Supremacy Clause grants "supreme" status only to the "the *Laws* of the United States." [US Const, art VI, cl 2.] And pre-emption takes place only when and if the agency is acting within the scope of its congressionally delegated authority, for an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. [*Merck Sharp & Dohme Corp v Albrecht*, 139 S Ct 1668, 1679; 203 L Ed 2d 822 (2019) (quotation marks and alterations omitted) (original emphasis).]

Thus, the preemption question simply takes us back to the question of whether Congress delegated authority to the Department of Homeland Security or ICE to restrict public access to records of non-federal entities. As discussed in Section II.A.2, *infra*, there is no statute conferring power on DHS or ICE to control the records of non-federal agencies. At most there is a delegation for control of federal records held by local agencies—although even that is questionable. See Br for Amici Curiae Michigan Immigrant Rights Center et al., pp 19-23 (February 26, 2021). As there is clearly no delegation of authority to control *local* records, there can be no federal preemption that would bar disclosure of the records at issue here.

> applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

The term "Service," as used in the regulation, refers to the Immigration and Naturalization Service ("INS"), ICE's predecessor agency, and should now be understood to refer to ICE.

The Court of Appeals' sweeping conclusion that FOIA does not allow disclosure of public records related to the detention of immigrants in Michigan is premised on three errors in interpreting 8 CFR 236.6. First, the Court of Appeals erred in interpreting the regulation to bar access to "non-Service" records that are locally created and maintained, a reading that is unsupported by the text or purpose of the regulation, and which would make the regulation ultra vires because there is no underlying statutory authority for such a regulation. Second, the Court of Appeals erred in interpreting the regulation to apply to records of people previously released, even though the regulation uses present-tense language. Finally, the Court of Appeals compounded the damage exponentially by mistakenly suggesting that 8 CFR 236.6 applies not just to persons in custody under an IGSA, who are in federal ICE custody, but also to individuals held under detainers, who are in state or local custody. We address each of these errors in turn.

A. 8 CFR 236.6 Does Not Apply to Local, "Non-Service" Records That Are Not Obtainable From ICE.

No court, to Plaintiff's knowledge, has ever before read 8 CFR 236.6 to exempt from disclosure *local* records that ICE does not have, with the effect of making those records entirely unavailable. Indeed, DHS itself has, in the past, taken the position that 8 CFR 236.6 does not apply to such local records. See *Abadia-Peixoto v US Dep't of Homeland Security*, unpublished order of the United States District Court for the Northern District of California, issued August 23, 2013 (Docket No. CV 11-04001); 2013 WL 4511925, at *3 (noting that DHS did not believe that 8 CFR 236.6 prevented county from releasing records regarding use of shackles on ICE detainees held in

county's facilities) (Ex E). The few cases addressing 8 CFR 236.6 have focused on whether local jailors can release *federal* records that are in the jailor's possession. And those courts that have upheld withholding of records under 8 CFR 236.6 have done so in the context of requests for federal records. See, e.g., *Voces De La Frontera*, 373 Wis 2d at 354, 372 (holding that applying 8 CFR 236.6 to bar release by local authorities of unredacted federal ICE I-247 detainer forms did not curb Wisconsin's presumption of record access because it merely channeled requests for federal records to the federal government); *Comm'r of Correction*, 307 Conn at 56 (addressing applicability of 8 CFR 236.6 to release by local authorities of printout from the National Crime Information Center computerized database). In other words, when courts have considered 8 CFR 236.6, they have done so in the context of records that are also obtainable through the federal FOIA. That is not the case here.

The federal FOIA "only obligates [a federal agency] to provide access to those [records] which it in fact has created and retained." *Kissinger v Reporters Comm for Freedom of the Press*, 445 US 136, 152; 100 S Ct 960; 63 L Ed 267 (1980). Indeed, the United States Supreme Court held that records of organizations receiving federal financial assistance grants are not agency records, and therefore are not subject to the federal FOIA, even though the federal agency had the right to obtain the records from the grantee. *Forsham v Harris*, 445 US 169, 179, 185; 100 S Ct 977; 63 L Ed 2d 293 (1980). See also *Landmark Legal Found v Environmental Protection Agency*, 272 F Supp 2d 59, 66 (D DC, 2003) ("It is well settled that a FOIA request pertains only to documents in the possession of the agency at the time of the FOIA request."); *Beveridge & Diamond, PC v United States Dep't of Health & Human Servs*, 85 F Supp 3d 230, 240 (D DC, 2015) (denying the requester access to public records under the federal FOIA because the records were in the control of the public university, not the federal agency); *Ferguson v Alabama Criminal*

Justice Info Ctr, 962 F Supp 1446, 1447 (MD Ala, 1997) (holding that the federal FOIA applies only to officers or employees of the United States and therefore does not obligate state agencies to comply); *Callaway v US Dep't of Treasury*, 893 F Supp 2d 269, 275 (D DC, 2012) (holding that agency did not have to seek and "produce records maintained by another federal government agency or obtain records from any other sources"); *Paxson v United States Dep't of Justice*, 41 F Supp 3d 55, 60-61 (D DC, 2014) (holding that DOJ and FBI did not have to search for records in systems under ICE's control).

The United States Supreme Court has established a two-part test to determine whether a record is an "agency record" subject to the federal FOIA's disclosure requirements: (1) "an agency must "either create or obtain" the requested materials" and (2) "the agency must be in control of the requested materials at the time the FOIA request is made." *US Dep't of Justice v Tax Analysts*, 492 US 136, 145; 109 S Ct 2841; 106 L Ed 2d 112 (1989). Under that test, most of the records at issue here are not agency records: ICE did not create or obtain them, nor were they under ICE's control. Accordingly, the vast majority of records Mr. Ramos-Gomez sought from CCSO are not obtainable through the federal FOIA. This is no hypothetical: Plaintiff filed parallel federal FOIA litigation against ICE, and the majority of the records sought from Calhoun were not produced.

Therefore, under the Court of Appeals' interpretation of 8 CFR 236.6—that all local records about people detained in Michigan by ICE (and even the local records of people held in state custody as the result of ICE detainers) are exempt from disclosure under Michigan's FOIA—almost everything that happens related to immigration detention in Michigan will be insulated from public scrutiny. Most locally created records (such as records related to a person's own medical treatment while detained, or video or audio recordings related to alleged abuse, or records related to in-custody deaths) will be completely unobtainable, unless the local detaining agency

happens to have provided copies of those records to ICE, something both jails and ICE will now have a strong incentive to ensure does not happen. Reading 8 CFR 236.6 to bar release of local records would thus have devastating results for transparency and accountability around immigration detention in Michigan.

Such a reading is also wrong as a matter of law because (1) the text of 8 CFR 236.6 is limited to federal records; (2) the underlying statutes at most delegated authority to the agency to adopt regulations governing "records of the Service" (i.e. the Immigration and Naturalization Service, now ICE); and (3) 8 CFR 236.6 must be interpreted in light of the regulatory purpose of channeling requests for federal records through ICE, a purpose which is inapplicable to local records that ICE does not have.

1. The Text of 8 CFR 236.6 Is Limited to Federal Records.

8 CFR 236.6 is not a model of clarity. (Note that Michigan's FOIA exemption requires the "statute" to "specifically describe" and "specifically exempt" the records at issue, MCL 15.243(1)(d), and here the regulation is so difficult to parse that it surely falls short of that rigorous standard.) Nevertheless, if one reads the regulation with an understanding of its history, of the statutes that purportedly delegate authority for its promulgation, and of its purpose, it is apparent that the regulation does not cover local, non-Service records.

We begin with the text itself. The second sentence of the regulation, which is key, reads:

> Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders.

The regulation relates to information that is "**under the control of the Service**." The Service (i.e. ICE) of course does not control records it does not have, such as non-Service, local records.

The second sentence also makes clear that the information "**shall be subject to public disclosure**. . . ." Public disclosure is to be "pursuant to the provisions of applicable federal laws,

regulations and executive orders," such as the federal FOIA or the Privacy Act. Here it is undisputed that records exist that would be released if they were in the possession of the federal government. If the federal government possessed the records at issue, Mr. Ramos-Gomez could obtain them through the federal FOIA. Moreover, under the Privacy Act, 5 USC 552a(d)(2), Mr. Ramos-Gomez is entitled to copies of records that the government maintains about him.[22] But in this case, Mr. Ramos-Gomez cannot obtain these records from the federal government, because the federal government does not have them. What matters for interpreting the regulation is that the regulation explicitly contemplates disclosure through federal record-access statutes. The regulation thus cannot be read as making secret entire categories of records that exist locally, but cannot be obtained through such federal public record request statutes. Indeed, in promulgating the regulation the drafters explained that it would not "address or alter in any way" the public's ability to obtain records from the federal government. 67 Fed Reg 19508, 19509 (April 22, 2002). In other words, because 8 CFR 236.6 provides that information "shall be subject to public disclosure" pursuant to the applicable federal laws and regulations the Court of Appeals erred in interpreting it to cover records that are not subject to public disclosure under those federal laws and regulations because the records are not in possession of the agencies to which those federal public records statutes like FOIA and the Privacy Act apply.

[22] 5 USC 552a(d) provides:

> **ACCESS TO RECORDS.—**Each agency that maintains a system of records shall—
>
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him . . . .

The first sentence of the regulation similarly indicates that the regulation relates only to federal records. It reads:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person **obtains information relating to any detainee**, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. [Emphasis added.]

The highlighted language makes clear that the information at issue is information that the contracting entity (here Calhoun) **obtains** related to the detainee. The word "obtained" is repeated in the last sentence as well. The regulation is thus not aimed at records that the state or local entity itself creates about the detainee, but rather at records it obtains from the federal government.

Interpreting 8 CFR 236.6 to bar access to **all** information about a detainee, not just records "of the Service," would lead to absurd results. See *Salas v Clements*, 399 Mich 103, 109; 247 NW2d 889 (1976) (describing "fundamental rule of statutory construction that departure from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question"); *Common Council of City of Detroit v Rush*, 82 Mich 532, 542; 246 NW2d 951 (1890) ("a thing within the letter [of the statute] is not within the statute, unless within the intention"). The regulation provides that no entity that houses, maintains or provides services to or otherwise holds a detainee on behalf of the Service "shall disclose or otherwise permit to be made public the name or other information relating to, such detainee." 8 CFR 236.6. If that prohibition applied regardless of whether the entity obtained the information from ICE, or itself created that information, then Calhoun would be barred, for example, from disclosing to local health authorities which detainees were vaccinated against COVID-19. That would be "disclos[ing] . . . other

information relating to" a detainee. Similarly, if Calhoun had to take a detained person to the hospital, Calhoun could not provide emergency room doctors with the person's jail medical records because that would be that would be "disclos[ing] . . . other information relating to" the detainee. Calhoun would even be barred from releasing any information about former criminal detainees if they are later taken into ICE custody.

Moreover, the regulation applies not just to entities like Calhoun, but also to "other person[s] who by virtue of any official or contractual relationship with such person obtains information relating to any detainee." Thus, if the Court of Appeals is correct that 8 CFR 236.6 applies indiscriminately to all information regardless of how it was obtained, a treating hospital—having obtained information about a detainee by virtue of treating them as a patient, a service for which ICE pays—could not disclose its emergency room records to the patient who received the treatment. Similarly, the medical provider contracted to provide care at Calhoun could not give a detainee a copy of his or her own medical file, as that is "other information relating to" the detainee. The reading of 8 CFR 236.6 that the Court of Appeals adopted would lead to absurd results.

2. The Underlying Statutes Do Not Delegate Authority to Promulgate a Regulation Restricting Access to Local, "Non-Service" Records.

While the language of 8 CFR 236.6 makes clear that it applies only to records "of the Service," if there is any doubt, one can look to the underlying statutes. Regulations must be interpreted in light of the statutes that purportedly authorize the agency to issue the regulation. See, e.g., *Brown v Rock Creek Min Co*, 996 F2d 812, 816 (CA 6, 1993). Because a regulation that is not based on a proper delegation of authority would be ultra vires, this Court should interpret the regulation in a way that comports with the statutes cited as authorizing the agency to issue the regulation. Cf. *Pauley v BethEnergy Mines, Inc*, 501 US 680, 706; 111 S Ct 2524; 115 L Ed 2d

604 (1991) (agency's interpretation of a regulation is presumed reasonable where it is in harmony with its authorizing statute).

There is serious doubt whether Congress delegated authority to DHS to issue 8 CFR 236.6 at all. Promulgated as an emergency regulation without notice and comment, 8 CFR 236.6 was issued in direct response to litigation after the September 11, 2001 attacks when the ACLU of New Jersey sought to obtain information about people being held by the federal government in county detention facilities. See Martinez, Comment, *Indefinite Detention of Immigrant Information: Federal and State Overreaching in the Interpretation of 8 CFR 236.6*, 120 Yale LJ 667, 670-671 (2010). As persuasively argued by the amici below, not one statute cited in the Federal Register as purportedly underlying authority authorizes DHS to control the records of non-federal entities, much less bars the release of records that are otherwise subject to public disclosure. See Br for Amici Curiae Michigan Immigrant Rights Center et al., pp 19-23 (February 26, 2021); cf. *United States v California*, unpublished order of the United States District Court for the Eastern District of California, issued July 9, 2018 (Docket No. 2:18-cv-490); 2018 WL 3361055, at *1 (rejecting argument that 8 CFR 236.6 prevented release of detention records to the state attorney general because "the Court does not find any indication in the cited federal statutes that Congress intended for States to have no oversight over detention facilities operating within their borders") (Ex F). This Court need not, however, decide if the regulation is entirely ultra vires, because interpreting the regulation in light of the purportedly delegatory statutes demonstrates that the regulation cannot bar disclosure of the local records requested here.

Interpreting 8 CFR 236.6 to bar access to local records, by contrast, would make the regulation ultra vires. The underlying statutes simply do not delegate authority to DHS to control records that are locally created and maintained. The Court of Appeals discussed two statutes that

are cited in the Federal Register as potential delegations of authority authorizing 8 CFR 236.6: 8 USC 1103 and 5 USC 301. Neither can be read as delegating authority to DHS to control records created and maintained by other entities.[23]

First, 8 USC 1103(a)(2) provides that the Secretary of Homeland Security "shall have control, direction, and supervision of all employees and all the files and records **of the Service**," i.e. the files and records of ICE. The phrase "of the Service" indicates that the Secretary shall control over ICE records, but in no way suggests that Secretary shall control the records of other entities. The Court of Appeals here also cited 8 USC 1103(a)(3) which grants the Secretary authority to "establish such regulations … as he deems necessary for carrying out his authority under the provisions of this chapter." But all that this "carrying out" authority does is allow DHS to issue regulations that are needed to support actions take pursuant to other delegations of authority. In other words, in order for a "carrying out" regulation to be valid, DHS must first have authority under the INA to take the action that the regulation is "carrying out."[24] Here, that means DHS can issue regulations necessary to "carry out" its authority to "control . . . the files and records

[23] None of the other statutes cited in the Federal Register can plausibly be read as delegating authority to DHS to control the records of other entities. Both federal FOIA (5 USC 552) and the Privacy Act (5 USC 552a) are pro-disclosure states and relate to federal records maintained by federal agencies. The other allegedly authorizing provisions for 8 CFR 236.6, cited without discussion in the Federal Register as potential authority for the regulation, are even more obviously inapposite. They include provisions of the Homeland Security Act (6 USC 112(a)(2), 112(a)(3), 112(b)(1), 112(e), 202, 251, 279, 291), the Immigration and Nationality Act (18 USC 1182, 1224, 1225, 1226, 1227, 1231, 1232, 1357, 1362), and the federal criminal code (18 USC 4002, 4013(c)(4)). None of those provisions can be plausibly read as a congressional delegation for DHS to issue regulations denying the public access to records held by state and local entities.

[24] See *Quinteros-Mendoza v Holder*, 556 F3d 159, 162-164 (CA 4, 2009) (holding that 8 USC 1103(a)(3) does not provide boundless and unreviewable discretion to DHS to adopt regulations attempting to limit judicial review); *Outdoor Amusement Business Ass'n v Dep't of Homeland Security*, 334 F Supp 3d 697, 720-721 (D Md, 2018) (rejecting government interpretations of 8 USC 1103(a)(3) which offer "no limiting principle" for the purposed rulemaking authority).

of the Service." 8 USC 1103(a)(2). But because Congress has not delegated any authority to DHS to control non-Service records, there is no congressional authorization under 8 USC 1103(a)(3) to issue regulations controlling non-Service records.

Second, 5 USC 301 provides that an agency may prescribe regulations, including regulations for the "custody, use and preservation of **its** records, papers, and property" (emphasis added). Again, the statutory language here makes clear that the agency can only make regulations about its **own** records, not the records of other entities. Moreover, 5 USC 301 specifically provides: "This section does not authorize withholding information from the public or limiting the availability of records to the public." Congress was not delegating authority to make records secret, but rather doing the opposite: making clear its intent that an agency's general rulemaking authority cannot be used to issue regulations that deny the public access to information about our government.

In sum, the Court of Appeals' interpretation of 8 CFR 236.6 as barring access to non-Service (i.e. local) records cannot be correct, because Congress never delegated authority to DHS to restrict public access to non-Service records.

3. 8 CFR 236.6 Must Be Interpreted in Light of the Regulatory Goal of Channeling Requests for Federal Records Through the Federal Agency.

8 CFR 236.6 was adopted in the wake of September 11, 2001, to address the national security implications of public access to information about people then being detained on national security grounds. As stated above, the regulation was initially promulgated as an emergency rule[25]

[25] See 67 Fed Reg 19508, 19510 (April 22, 2002) (stating that there was good cause to adopt the interim rule, without public comment, "[i]n light of the national emergency declared by the President on September 14, 2001, in Proclamation 7453, with respect to the terrorist attacks of September 11, 20001, and the continuing threat by terrorists to the security of the United States"); see also *Indefinite Detention of Immigrant Information*, 120 Yale LJ at 670; Chen, *State Incarceration of Federal Prisoners After September 11: Whose Jail Is It Anyway?*, 69 Brooklyn L Rev 1335, 1342 (2004).

to override *County of Hudson*, 352 NJ Super 44. That case involved an attempt by the ACLU of New Jersey to obtain the names of detainees held in secret detention by INS in the immediate aftermath of September 11. After a court ordered a local jail to release information about INS detainees being held in secret for national security purposes, the INS promulgated an emergency regulation to prohibit disclosure. See 67 Fed Reg 19508 (April 22, 2002). As the New Jersey court explained, "the real focus of the regulation, as evidenced by the rationale presented in its preamble, may be seen to be on the facilitation of law enforcement efforts in the wake of September 11." *Co of Hudson*, 352 NJ Super at 78. Indeed, the last sentence of the regulation, which states that it applies to "requests that are the subject of proceedings pending as of April 17, 2002," 8 CFR 236.6, directly references the then-pending appeal in *County of Hudson*. The rule was thus specifically designed to void the trial court's decision in *County of Hudson* and stop the ACLU from obtaining information about who was being detained and whether they had counsel. The rule was adopted as a final rule without change in January 2003, 68 Fed Reg 4364 (January 29, 2003), and is now codified as 8 CFR 236.6.

The central justification for 8 CFR 236.6 was thus to ensure that before ICE records are released, ICE has an opportunity to determine under the federal FOIA whether there are applicable exemptions authorizing redactions or the withholding of records. As explained in the Federal Register,

> the rule ensures that any disclosure of information pertaining to federal detainees will be governed by the federal Freedom of Information Act (FOIA), 5 U.S.C. 552. The FOIA provides generally for disclosure of records by federal agencies, but contains exceptions that Congress believed crucial to the effective functioning of the national government. See, e.g., 5 U.S.C. 552(b)(1), (7)(A), (C), (E), (F). The rule here ensures that federal interests will be protected by channeling information requests through the FOIA. [68 Fed Reg at 4366.]

Cf. *Voces De La Frontera*, 373 Wis 2d at 373 (finding 8 CFR 236.6 applicable to release of federal I-247 forms because "the federal government is in a better position to determine whether there are privacy and safety risks innate in releasing records that it created"). That goal simply does not apply when records cannot be obtained from ICE through federal FOIA because ICE does not have them.[26]

In sum, given the text of the regulation, given that any statutory delegation of authority to issue regulations limiting access to records at most relates to ICE's own records, and given the regulatory purpose of channeling requests for ICE's own records through ICE, 8 CFR 236.6 cannot be interpreted as barring access to local, non-Service records. The Court should grant leave to correct this error because, under the Court of Appeals' reasoning, extensive categories of records related to immigration detention in this state are now entirely unavailable.

B. 8 CFR 236.6 Does Not Apply To People Who Are No Longer Detained.

It is undisputed that Mr. Ramos-Gomez was not in ICE custody when the ACLU submitted the FOIA request for his records from Calhoun County. Still, Calhoun argues that 8 CFR 236.6 bars release of his records. Because the plain text, structure and history of this regulation confirm that 8 CFR 236.6 applies only to individuals currently in ICE custody at the time of the records request, the Court of Appeals erred in affirming the grant of summary disposition to Calhoun.

First, by its own terms, the regulation applies only to persons who a "state or local government entity . . . *houses, maintains, provides services to, or otherwise holds* . . . on behalf of [ICE]." 8 CFR 236.6 (emphasis added). The present tense—repeatedly used throughout the regulation—

[26] The other purported goal of the regulation—protecting detainee privacy by channeling requests for information through FOIA to allow for privacy redactions, see 68 Fed Reg at 4366—is served equally well by Michigan's FOIA. Just like the federal FOIA, the Michigan FOIA contains a privacy exemption. See MCL 15.243(1)(a).

underscores that the regulation does not extend to records for a detainee who is no longer being held by a covered entity. Courts must interpret a text as written, *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000), and must look to the "choice of verb tense to ascertain a statute's temporal reach," *Carr v United States*, 560 US 438, 448; 130 S Ct 2229; 176 L Ed 2d 1152 (2010). See also *United States v Wilson*, 503 US 329, 333; 112 S Ct 1351; 117 L Ed 2d 593 (1992) ("verb tense is significant in construing statutes"); *Gwaltney of Smithfield, Ltd v Chesapeake Bay Found, Inc*, 484 US 49, 57; 108 S Ct 376; 98 L Ed 2d 306 (1987) (the "undeviating use of the present tense" is "one of the most striking indicia of the prospective orientation" of a statute); *Ingalls Shipbuilding, Inc v Dir, Office of Workers' Comp Programs*, 519 US 248, 255; 117 S Ct 796; 136 L Ed 2d 736 (1997) ("[T]he use of the present tense (i.e. 'enters') indicates that the 'person entitled to compensation' must be so entitled at the time of the settlement."). The same rules apply to the interpretation of regulations. See *Thompson v United States*, 87 Fed Cl 728, 733 (2009).

Here, 8 CFR 236.6 uses only present-tense verbs in describing the situation where an entity is prohibited from disclosing information. The first sentence of 8 CFR 236.6 describes the type of "person" who is restricted from disclosing information—one presently holding a detainee—and the type of information that is restricted—"the name, or other information relating to **such** detainee" (emphasis added). The next three sentences of 8 CFR 236.6 refer back to the first paragraph, discussing "such persons" (i.e. ones presently holding a detainee) and "such information" (i.e. information about detainees presently being held).

In its decision, the Court of Appeals rejected any temporal limit on 8 CFR 236.6, holding that it prohibits release of documents in perpetuity. Ex C, COA Opinion, p 5. The court, relying exclusively on the second sentence of the regulation, concluded that "[t]he plain language of the

regulation clearly states that **all** information relating to a detainee is 'under the control of the Service . . . .'" *Id*. (emphasis added). But the second sentence of the regulation does not say that **all** information is under the control of the Service, but rather says that "**such information**" is under the control of the Service. What "*such* information" refers to is set out in the first sentence, which the court inexplicably ignores. Again, "such information" is "information relating to" a detainee whom a state or local government entity "houses, maintains, provides services to, or otherwise holds." 8 CFR 236.6. In other words, "such information" is governed by the present tense. See *United States v Merklinger*, 16 F3d 670, 676 (CA 6, 1994) (reasoning that the word "such" limits the scope of the clauses to such items as are described previously); *Haveman v Board of Co Rd Comm'rs*, 356 Mich 11, 21; 96 NW2d 153 (1959) ("such" functions "to the exclusion of that more remotely mentioned"); cf. *Van Buren v United States*, 141 S Ct 1648, 1654-1655 (2021) (analyzing what statute's use of the term "so" references, and rejecting the government's argument that "so" refers to circumstances "not identified earlier in the statute"). Had the drafters of 8 CFR 236.6 intended to extend the prohibition on disclosure indefinitely, no matter how long ago a person was detained, then instead of using the words "such detainee," they would have used language like "a detainee who is or was previously detained by such entity." Mr. Ramos-Gomez was not in immigration custody when he made his records request, and therefore was not requesting "such information" as defined in the regulation. In overlooking this important limiting factor, the Court of Appeals adopted an overbroad interpretation of the regulation, untethered from the text.

Additionally, the structure of the regulation confirms that any prohibition should apply only to current detainees. Courts must "examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme," and must "consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Ally Fin Inc v State*

Treasurer, 502 Mich 484, 493; 918 NW2d 662 (2018). See also *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) (statutory interpretation requires consideration of the placement of particular provisions within the overall statutory scheme). In addition, "an analysis of a statute's legislative history is an important tool in ascertaining legislative intent." *Id.* at 168. The same is true of regulations.

"[B]ecause agencies themselves designate where in the Code of Federal Regulations their regulations should be codified, that choice has interpretive significance." *Indefinite Detention of Immigrant Information*, 120 Yale LJ at 672-673. DHS could have, but did not, place 8 CFR 236.6 under 6 CFR Part 5, which governs the "Disclosure of Records and Information" by DHS, including disclosures under the federal FOIA and the Privacy Act.[27] This would have been the logical place to put the regulation if it were intended to limit access to records long after a person is released. Instead, the agency chose to include the provision under a subpart of the regulations regarding "Detention of Aliens Prior to Order of Removal"—a subpart that specifically regulates individuals *currently* in detention, and not individuals who have been released from custody or removed from the country.

As this Court has explained, "because context is a primary determinant of meaning, . . . for an interpretation that seeks the ordinary meaning of the statute, it is the narrower context drawn from neighboring provisions within a statute that is most appropriate to consider." *TOMRA of N Am, Inc v Dep't of Treasury*, 505 Mich 333, 349-350; 952 NW2d 384 (2020) (citations and quotation marks omitted). Again, the same principle applies in interpreting regulations. Here, the context is that other regulations under the same subpart address only individuals under ICE's

[27] Alternately, the regulation could have been placed in 8 CFR 103, which deals with "Availability of Records," and cross-references 6 CFR Part 5. See 8 CFR 103.42.

current custody. See, e.g., 8 CFR 236.1 (outlining procedures for custody and detention of those under ICE detainers); 8 CFR 236.2 (addressing service for confined individuals, minors and those deemed legally "incompetent"); 8 CFR 236.3 (outlining process for processing, detention and release of noncitizen minors). Moreover, both the title of the subpart ("Detention of Aliens Prior to Order of Removal") and of 8 CFR 236.6 itself ("Information regarding detainees") cover people who are currently detained. See *INS v Nat'l Ctr for Immigrants' Rights, Inc*, 502 US 183, 189; 112 S Ct 551; 116 L Ed 2d 546 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

The regulatory history of 8 CFR 236.6 further underscores that the regulation was meant to apply only to current detainees. In fact, the agency provided contemporaneous statements of its intent regarding the new regulation. The Federal Register explains: "This rule . . . *only* prevents non-Federal providers from making public disclosures of information pertaining to the Service detainees that the non-Federal provider *is housing* on behalf of the Service." 67 Fed Reg 19508, 19510 (April 22, 2002) (emphasis added). The Federal Register uses similar language in multiple places with respect both to the interim and final rule. See, e.g. *id.* at 19509 ("This rule clarifies that … requests for public disclosure of information related to Service detainees, including Service detainees *temporarily being held* by non-Federal providers on behalf of the Services, will be directed to the Service." (emphasis added)); 68 Fed Reg 4364, 4366 (January 29, 2003) ("This rule applies *only* to release of information about Service detainees *being housed or maintained* in a state or local government entity or a privately operated detention facility." (emphasis added)).[28]

[28] See also 67 Fed Reg at 19508 ("This rule clarifies that … request for public disclosure of information related to Service detainees, including Service detainees temporarily being held by non-Federal providers on behalf of the Services, will be directed to the Service."); *id*. at 19510 (discussing laws of states where "detainees are housed and maintained"); *id.* (discussing detainees "being detained by non-Federal service providers"); *id*. at 19509 (expressing concern that

The consistent use of the present tense shows that the rule applies only to information regarding *current*, not former, detainees.

Defendant, in its briefing below, suggested that the regulation's verb tense, placement and regulatory history do not matter because a non-textual reading would better accomplish the regulation's purposes, supposing that the drafters might have been concerned about releasing information concerning past detainees as well as present detainees. See Def's Br, pp 13-17. However, except "in rare cases [where] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters," the court is bound by the terms in the text, for "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words" the drafters chose. *Griffin v Oceanic Contractors*, 458 US 562, 571; 102 S Ct 324; 573 L Ed 2d 972 (1982) (citations and quotation marks omitted). The text of 8 CFR 236.6, supported by the regulatory history and placement of the regulation, show that the drafters' concern was with presently detained persons. The drafters may well have chosen the present tense in recognition of the fact that once a person is released, the concerns underlying the regulation become much less pressing. After all, releasing information about a person who is currently the subject of an ongoing investigation is very different from releasing information after the investigation has concluded. And the drafters may well have recognized that there are competing concerns—the public's right to know what its government is doing, on the one hand, and the government's interest in keeping

"disclosure of those aliens' detention and the location of their detention" could affect national security); 68 Fed Reg at 4364 (rule governs disclosure of "information relating to any detainee being housed or otherwise maintained or provided service on behalf of [ICE]"); *id.* at 4367 ("In effect, the rule will relieve state or local government entities of responsibility for the public release of information relating to any immigration detainee being housed or otherwise maintained or provided service on behalf of [ICE]."); *Indefinite Detention of Immigrant Information*, 120 Yale LJ at 674 (noting that INS issued a press release the day after its interim rule took effect stating that the regulation "will cover all INS detainees being housed temporarily at the facilities on behalf of INS," and as using the present tense "is housed" and "are held" in describing detainees).

some information secret, on the other—and may have decided to balance those concerns by restricting access only to the records of those currently detained. Nowhere in the explanation for either the interim rule or the final rule is there any suggestion, much less discussion, that the rule was intended to apply to individuals who are no longer being housed by a contracted facility—something the drafters would presumably have mentioned if they intended to bar access to records in perpetuity. In any event, even if the goals of the regulation could arguably be better achieved if the regulation were differently written, that does not give a court license to rewrite the regulation.[29] *Lepp v Cheboygan Area Sch*, 190 Mich App 726, 731; 476 NW2d 506 (1991).

Finally, consistent with the "presumption against preemption," enactments that may preempt state law must be narrowly interpreted so as to invalidate as little state law as possible. *Medtronic, Inc v Lohr*, 518 US 470; 116 S Ct 2240; 135 L Ed 2d 700 (1996). Here, to the extent there is any ambiguity about the temporal reach of 8 CFR 236.6 (despite the present tense language which Plaintiff believes resolves the question), the presumption against preemption means that any such ambiguity must be resolved in favor of a narrow interpretation, in other words a limited temporal reach. If the regulation is thus narrowly interpreted, the Court does not need to reach preemption: there would be no conflict between state and federal law regarding whether the requested records can be released.

Two other courts have rejected the temporal limit on Section 236.6, but those opinions ignore the plain text and structure of the regulation. As the dissent in *Voces De La Frontera* noted:

[29] To the extent that ICE fears that local officials might fail to recognize the sensitivity of certain information about former detainees, nothing prevents ICE from requiring as part of an IGSA contract that it have the opportunity to review documents before they are released. Nor are local jails precluded from consulting with ICE before releasing documents. See *Voces De La Frontera*, 373 Wis 2d at 382 n 7, 386 (Bradley, J., dissenting) (describing consultation between local records custodian and ICE to determine what redactions to apply).

> Despite the plain language of 8 C.F.R. § 236.6 and the clear indications in the Federal Register reiterating that the application of the regulation is limited to detainees in federal custody, the majority concludes otherwise. By positing that the regulation is not limited to detainees in federal custody, i.e. "8 C.F.R. § 236.6 is not temporarily limited," the majority impermissibly rewrites the regulation, deleting words from it. [373 Wis 2d at 381 (Bradley, J., dissenting).]

The court in *Commissioner of Correction*, 307 Conn 53, committed a similar error by focusing on the last sentence of the regulation, which provides:

> This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002. [8 CFR 236.6].

The court there concluded that this language was intended to clarify that the regulation applied to former detainees, or it would otherwise be superfluous. *Comm'r of Correction*, 307 Conn at 70. In fact, the last sentence, with its explicit reference to the date of adoption, was intended to ensure that the regulation would cover the public records request that was the subject of the litigation that triggered adoption of the emergency regulation. Indeed, the commentary on the interim rule says exactly that: "The rule specifically provides that it shall apply to all pending and future requests for disclosure of or proceedings concerning the release of the name, or related information, of detainees held on behalf of the Service, including requests that are the subject of proceedings or litigation as of the effective date of the rule." 67 Fed Reg at 19510. See also *Co of Hudson*, 352 NJ Super at 85 (stating that 8 CFR 236.6 was adopted "by the very governmental entity which was a losing party to the litigation, in order to nullify the adverse ruling"). In other words, the comment explains the purpose of the last sentence of the regulation: it is a retroactivity provision intended to ensure that the regulation apply to persons taken into custody prior to the regulation's effective date. And the term "such person" in that last sentence refers back to the first sentence of the regulation that defines a person who currently "holds" detainees as subject to the regulation. Read

in its full context, therefore, the last sentence restricts custodians from releasing information about an individual presently in ICE custody, regardless of when that information was obtained during the course of the detention.

In sum, the Court of Appeals' decision runs counter to the plain text, structure and history of 8 CFR 236.6. If not corrected, the Court of Appeals' interpretation would allow local entities in Michigan and beyond to hide all information about ICE detainees, no matter how long ago they were released. This Court should grant leave and reject such a drastic and overbroad interpretation of the regulation.

C. This Court Should Correct the Lower Court's Erroneous and Unwarranted Holding Regarding 8 CFR 236.6's Application to Detainer Records.

The Court of Appeals compounded its other errors by opining on a legal issue that was not presented by the facts of this case, not briefed nor argued by either party, and therefore was not properly before the court. CCSO held Mr. Ramos-Gomez in *federal* custody, pursuant to its IGSA contract with ICE. But the Court of Appeals went beyond deciding 8 CFR 236.6's application to such federal custody. It also held that 8 CFR 236.6 reaches records of *local* custody, when a person is held by a local jail pursuant to an ICE detainer—even though CCSO never received or held Mr. Ramos-Gomez on an ICE detainer. The Court of Appeals plainly had no basis to reach that issue—an issue that has divided other courts.[30] Plaintiff alerted the court to this error in its motion for reconsideration, but the court failed to correct the error. Under the Court of Appeals' reasoning, the records of thousands of people held in state custody on detainers in Michigan each year would be exempt from disclosure, with far-reaching consequences in Michigan and beyond. Because the

[30] Compare *Voces de la Frontera*, 373 Wis 2d at 353 (concluding 8 CFR 236.6 applies to records of people held on detainers), with *id.* at 380 (Bradley, J., dissenting) (concluding that 8 CFR 236.6 does not apply to such individuals as the "regulation applies only to detainees being held on behalf of federal immigration authorities").

Court of Appeals' "decision is clearly erroneous and will cause material injustice" if not addressed, MCR 7.305(B)(5), this Court should vacate this part of the decision below.

The Court of Appeals improperly reached this issue by conflating two distinct types of detention. On the one hand, jurisdictions like Calhoun County enter into IGSA contracts with ICE to provide bed space for ICE detainees. Such individuals are detained by ICE—in *federal* custody—but are housed in local facilities where ICE rents bed space. On the other hand, local jurisdictions may receive detainer requests from ICE asking them to extend the length of *state or local* custody before a person is transferred to ICE custody. See 8 CFR 287.7(d); DHS Form I-247A (asking state and local jails to extend custody for up to 48 hours to give ICE agents time to arrest the person and transfer them to ICE custody). In other words, individuals held by state and local authorities on detainers are not yet in federal (ICE) custody. CCSO held Mr. Ramos-Gomez only in the first kind of detention: pursuant to its IGSA with ICE.[31] This fact has been undisputed throughout this case. See Def's Br, p 2 ("Mr. Ramos-Gomez was detained at the Calhoun County Jail based only on its contract with DHS/ICE."); Dyer Aff, ¶ 4.b, COA Appendix 45a (CCSO's FOIA Officer averring that the only records Calhoun has for Mr. Ramos-Gomez are those related to his detention under an IGSA). Neither party briefed the applicability of 8 CFR 236.6 to individuals held on ICE detainers.

The Court of Appeals, however, incorrectly stated that Calhoun County held him based on an ICE detainer, and that 8 CFR 236.6 applied as a result of the detainer. See Ex C, COA Opinion, p 4 ("Mr. Ramos-Gomez was held and detained by CCSO because of an ICE detainer."); *id*., p 6

[31] While ICE had previously sent a detainer for Mr. Ramos-Gomez to a different entity—Kent County—Calhoun County never received an ICE detainer, and therefore could not have held him pursuant to one. See Am Compl, ¶ 12; Dyer Aff, ¶ 4.b, COA Appendix 45a. Thus, 8 CFR 236.6 could apply to him only by virtue of the IGSA contract.

("[H]e was still a 'detainee' [under 8 CFR 236.6] because he was detained by defendant as a result of an ICE detainer."). Plaintiff alerted the Court of Appeals to this error in its motion for reconsideration and asked the court to remove the incorrect factual statements and legal conclusions about ICE detainers, see Mot for Reconsideration, but without explanation, the court refused to correct this clear error.

The Court of Appeals' overreach will have serious consequences if uncorrected. ICE issues more than a thousand detainers each year to jails across Michigan.[32] These records are critically important. Detained people need them to understand their treatment and challenge unlawful detentions, defense counsel need them represent their clients, and the public needs them to understand how public funds and jail resources are being spent, as well as to understand the consequences of ICE's entanglement with local law enforcement agencies.

The Court of Appeals not only erred in reaching an issue that was neither presented nor briefed, but the Court was wrong on the law. As 8 CFR 236.6 and its preamble make clear, the "rule applies only to release of information about *Service detainees*," i.e. those held in federal custody. 67 Fed Reg at 19511 (emphasis added). But people held on detainers are still in *state* custody—they are not ICE detainees yet, until an ICE agent comes to arrest them and place them in federal custody. ICE itself has repeatedly stated as much, explaining that when a person is held on a detainer, the "detainee remains in *state* custody," not ICE custody, "[u]ntil an immigration officer . . . arrests the detainee." *Tenorio-Serrano v Driscoll*, 324 F Supp 3d 1053, 1063 (D Ariz, 2018) (describing ICE's position). Other courts have recognized this critical difference, explaining that individuals held on detainers are not yet ICE detainees in federal custody. See, e.g., *Abriq v*

[32] See Syracuse University, Latest Data: ICE Detainers, https://trac.syr.edu/phptools/immigration/detain/.

Metro Gov't of Nashville, 333 F Supp 3d 783, 787 (MD Tenn, 2018) (distinguishing the plaintiff's situation from "cases involving continued detention, pursuant to detainers and/or administrative warrants, of aliens already in state custody" because "[p]laintiff was brought to the [local jail] in ICE custody," pursuant to an IGSA contract).

8 CFR 236.6, by its own terms, does not apply to people who are not in ICE custody. And ICE itself recognizes that it does not bar the disclosure of detainer records, because ICE's own detainer form provides that an "alien *must* be served with a copy of this form," and the form may be provided "to any other law enforcement agency" to which a person is transferred. DHS Form I-247A. Those instructions are not consistent with interpreting detainers to be subject to 8 CFR 236.6's disclosure bar. And local jails across the country regularly produce records pertaining to people they hold on ICE detainers, and have done so for decades. See e.g., CATO Institute, *U.S. Citizens Targeted by ICE: U.S. Citizens Targeted by Immigration and Customs Enforcement in Texas* (August 29, 2018)[33] (discussing data on ICE detainers from Travis County Sheriff's Office in Texas from 2005 through 2017); Asian Americans Advancing Justice-Asian Law Caucus et al., *Turning the Golden State Into a Sanctuary State* (March 2019)[34] (same for 169 law enforcement agencies including 121 police departments and 48 sheriff's departments spanning every county in California). The Court of Appeals' decision threatens to upend this longstanding and widespread practice.

The Court of Appeals' erroneous ruling on an issue that was not present in this case could have broad consequences. Because of this clear error below and the potential impact of such error

[33] Available at https://www.cato.org/immigration-research-policy-brief/us-citizens-targeted-ice-us-citizens-targeted-immigration-customs.

[34] Available at https://www.advancingjustice-alc.org/wp-content/uploads/2019/03/SB54-Report_FINAL.pdf.

on availability of records for people held on detainers, this Court should vacate that portion of the decision. Under MCR 7.305(H)(1), this Court has broad discretion to correct such erroneous legal pronouncements, and frequently does. See, e.g., *People v Vayko*, 499 Mich 959 (2016) (vacating lower court's imposition of fees, remanding for further proceedings, and instructing lower court to amend presentence report to correct the statutory citation for defendant's conviction); *People v Schlottman*, 506 Mich 1024 (2020) (vacating the lower court's order and remanding for reconsideration of defendant's motion to correct invalid sentence); *Reaume v Twp of Spring Lake*, 505 Mich 1108 (2020) (vacating part of Court of Appeals' opinion analyzing statute at issue). Here, too, to the extent that the Court of Appeals' opinion suggests 8 CFR 236.6 applies to records of persons held on detainers, it should be vacated.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, this Court should grant this application for leave to appeal, reverse the trial court's grant of summary disposition in favor of Defendant and the trial court's denial of summary disposition for Plaintiff, and remand with instructions to enter summary disposition in favor of Plaintiff.

Respectfully submitted,

By: /s/ Miriam J. Aukerman

Miriam J. Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy St., Suite 260
Grand Rapids, MI 49506
(616) 301-0930

Daniel S. Korobkin (P72842)
Monica Andrade (P81921)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824

Merrick Wayne*
Loevy & Loevy
311 North Aberdeen, 3rd Floor
Chicago, IL 60607
(312) 243-5900

Attorneys for Plaintiff-Appellant

Dated: July 6, 2021

* Not admitted in Michigan